

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARTHUR USHERSON,

Plaintiff,

v.

BANDSHELL ARTIST MANAGEMENT,

Defendant.

Docket No. 1:19-cv-6368 (JMF)

**DECLARATION OF BRAD R. NEWBERG IN SUPPORT OF DEFENDANT'S MOTION
FOR SECURITY FOR COSTS AND FEES**

I, Brad R. Newberg, declare:


1. I am an attorney licensed to practice in the United States District Court for the Southern District of New York.
2. I am a partner in the Intellectual Property department of McGuireWoods LLP, which represents Defendant Bandshell Artist Management ("Defendant" or "Bandshell").
3. I make this declaration in support of Defendant's Motion for Security for Costs and Fees.
4. The photograph of Bob Dylan, Leon Redbone, and David Bromberg at the Mariposa Folk Festival in 1972 at issue in this case (the "Photograph") was used as Leon Redbone's profile cover photograph. A true and correct copy of a screenshot of Leon Redbone's Facebook page is attached as Exhibit 1.
5. On September 19, 2019, I emailed Mr. Liebowitz given that the Court Ordered that the Plaintiff provide Defendant with copies of records sufficient to show royalties paid the last three times the photograph at issue was licensed and the number of times the work

had been licensed in the past three years. On September 20, he stated that he had not found any prior licensing for this photograph. A true and correct copy of this email exchange is attached as Exhibit 2. Mr. Liebowitz has confirmed this lack of licensing for the Photograph several times since.

6. Mr. Liebowitz initially stated that a large sum of money would be required to settle this case, both to my client and to myself.
7. When Plaintiff seemed fixed on its large demand, my client authorized me to serve Plaintiff with a Rule 68 Offer of Judgment for \$800, which I did. Plaintiff has never accepted or responded to this offer. A true and correct copy of this email exchange and the Offer of Judgment is attached as Exhibit 3.
8. After serving the Rule 68 Offer of Judgment, we redoubled our investigative efforts and found the Photograph located and published in several locations.
9. I found the Photograph in a 2004 message board thread seeking pictures of David Bromberg and Bob Dylan together. A true and correct copy of a screenshot of this message board thread is attached as Exhibit 4.
10. My associate, Michael Shafer, under my direction, found a picture of the Photograph published in a 1973 issue of *Touch* magazine. One of the places this publication was found was actually in the “Published Works” section of Plaintiff’s webpage. It was published with no copyright notice, but simply a shortened version of Plaintiff’s name. A true and correct copy of a screenshot of this section of Plaintiff’s webpage is attached as Exhibit 5.

11. Mr. Shafer, under my direction, found many other instances of Plaintiff's work published prior to 1989 with similarly lacking copyright notice. True and correct copies of screenshots collecting these instances are attached as Exhibit 6.
12. At the November 14 Court conference, Plaintiff's counsel referred to the Photograph as "iconic." A true and correct copy of the relevant pages of the transcript for this conference is attached as Exhibit 7.
13. As shown in Exhibit 7, this Court noted at the November 14 Court conference that the potential for damages here is quite small and likely to be around the minimum statutory range.
14. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Dated: November 26, 2019



Brad R. Newberg (#BN1203)

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Declaration of Brad R. Newberg with the Clerk of the Court using the CM/ECF system on this 27th day of November, 2019, which constitutes service on Plaintiff, a registered user of the CM/ECF system pursuant to Fed. R. Civ. P. 5(b)(2)(E).

Dated: November 27, 2019

/s/ Brad R. Newberg
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